No. 85-1437

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

PATRICIA WILKINS,

Petitioner,

v.

CHRISTOPHER SAYRES, RONALD LOVEJOY, JOSEPH ENGLEHARDT, EDDIE SANCHEZ, RICHARD BUCHOLTZ,

Respondents.

PATRICIA WILKINS,

Petitioner,

v.

FREDERICK ROUSCH, ORRIE YNIQUEZ, WILLIAM COWHEY, WALTER JACKSON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

In a civil rights action brought pursuant to 42 U.S.C. 1983 (1982), in which the affirmative defense of qualified immunity has been asserted, and in which the trial court has determined that the federal constitutional rights alleged to have been violated were clearly established at the time of the alleged violation, may the trial court instruct the jury on the affirmative defense of qualified immunity?

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In the Supreme Court of the United States

OCTOBER TERM, 1985

PATRICIA WILKINS, PETITIONER,

v.

CHRISTOPHER SAYRES, ET AL., RESPONDENTS.

PATRICIA WILKINS, PETITIONER,

v.

FREDERICK ROUSCH, ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Patricia Wilkins petitions this Court for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these cases.

OPINION BELOW

The opinions of the Court of Appeals (App. A., 1a-6a and App. B, 1b-3b, infra) are Memoranda not for publication.

JURISDICTION

The judgments of the Court of Appeals were entered on February 4, 1986 and Februarv 19, 1986, respectively. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1) and Rule 19.4 of this Court.

STATEMENT

In the complaints, CR-1, it is alleged that defendant Anaheim, California police officers illegally detained plaintiff in violation of her rights under the Fourth Amendment to the United States Constitution, Wilkins v. Sayres, and entered plaintiff's home and searched it, Wilkins v. Rousch. (These incidents were separate and unrelated and occurred at different places and times.)

Separate trials were had, and the juries returned verdicts for defendants. Memoranda, App. A, at 1a, App. B at 1b. Before instructing the jury, the Court ruled that the law with respect to Wilkins' detention was clearly established at the time of the challenged conduct and that the law with respect to entry and search was clearly established at the time of the challenged conduct. Ibid. Yet, the Court instructed the juries on the defense of qualified immunity.

REASONS FOR GRANTING THE PETITION

1. There has been a faulty construction of decisions of this Court which will affect virtually every action brought under 42 U.S.C. 1983 and pursuant to this Court's opinion in Bivins v. Six Unknown Agents, 403 U.S. 388 (1971).

2. Public officials have used methods which are alien to our American system of justice.

3. The opinions below are at odds with

A. decisions in the same Circuit, and

B. decisions in other circuits.

Petitioner is cognizant of the fact that the Supreme Court does not sit as a court of errors, but rather sits to resolve important issues of federal law.

The fundamental civil rights laws which govern the conduct of all law enforcement officers throughout this Country and which provide for remedies for those who allege and prove that their federal civil rights were violated, have been interpreted in such a way so as to pervert their meaning, invite illegal and unethical conduct, and impugn the integrity of the federal courts.

Specifically, 42 U.S.C. 1983 has been interpreted in such a way as to provide a defense to allegations of wrongdoing by police officers with which this Court has done away,

and with respect to which other decisions both in the same Circuit and in other Circuits are at odds.

1. THIS COURT DID AWAY WITH THE SUBJECTIVE COMPONENT OF THE DEFENSE OF QUALIFIED IMMUNITY.

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), this Court did away with the subjective component of the affirmative defense of qualified immunity. In Mitchell v. Forsythe, 105 S. Ct. 2806, 2816 (1985), this Court held:

> All [a court] need determine [on a motion to adjudicate the issue of qualified immunity] is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions ....

Thus, the effect of both Harlow and Mitchell was to reduce the question of the applicability of the affirmative defense of qualified

immunity to a purely legal question. In so doing, this Court sub silentio, modified its holding in Procunier v. Navarette, 434 U.S. 555, 562 (1978), to the extent Procunier provided that part of the test on determining the applicability of the qualified immunity defense was "if [defendants] knew or should have known of [the] right [violated], and if [defendants] should have known that their conduct violated the constitutional norm." The "knew or should have known" part of the Procunier test was part of the subjective component of the defense, and was done away with in Harlow.

The issue of qualified immunity is one purely of law: if the law was clear, the defense is inapplicable; if the law was not clear, not only is the defense applicable, but the action is over for the plaintiff, for the defense operates as a bar to suit.

Both the trial court and the Court of Appeals failed to follow this Court's holdings in both Harlow and Mitchell. See also, Davis v. Scherer, 104 S. Ct. 3012, 3018 (1984).

Therefore, on this ground, certiorari should be granted.

2. THE CONSTRUCTION GIVEN BY THE COURTS BELOW TO THE DEFENSE WILL OPERATE TO PERMIT PUBLIC OFFICIALS TO ESCAPE LIABILITY FOR WRONGFUL CONDUCT BASED ON A THEORY OF DEFENSE WHICH NO LONGER EXISTS.

In the complaints it is alleged that defendant police used methods alien to our Constitution. To permit these officials to escape potential liability based on a defense which this Court has ruled no longer exists, in the form in which it existed prior to this Court's decisions in Harlow, Mitchell and Scherer, is a result which will have a significant deliterious effect on constitutional

litigation at least throughout the vast environs of the Ninth Circuit so that this Court should grant certiorari.

3. THE OPINIONS BELOW ARE AT ODDS BOTH WITH DECISIONS IN THE NINTH CIRCUIT AND OTHER CIRCUITS.

A. The opinions below are at odds with other Ninth Circuit decisions. See, Lowe v. City of Monrovia, 775 F. 2d 998, 1011 (9th Cir. 1985); Flores v. Pierce, 617 F. 2d 1386, 1391-92 (9th Cir.), cert. denied, 449 U.S. 875 (1980); Haygood v. Younger, 717 F. 2d 1472, 1483 (9th Cir. 1983), withdrawn, 729 F. 2d 613 (9th Cir. 1984), reversed on other grounds, 769 F. 2d 1350 (9th Cir. 1985); but see, Bilbrey v. Brown, 738 F. 2d 1462 (9th Cir. 1984).

B. The opinions below are at odds with the decisions in all other Circuits who have ruled on this issue. See, B.C.R. v. Fontaine, 727 F. 2d 7, 10 (1st Cir. 1984); Trejo v. Perez, 693 F. 2d 482, 485 (5th Cir.

1982); Stokes v. Delcambre, 710 F. 2d 1120, 1125 (5th Cir. 1983); Donta v. Hooper, 774 F. 2d 716, 719 (6th Cir. 1985); Windsor v. Tennessean, 719 F. 2d 155, 165 (6th Cir. 1983); cert. denied, 105 S. Ct. 105 (1984); Patzner v. Burkett, 779 F. 2d 1363, 1371 (8th Cir. 1985); Goodwin v. Circuit Court, 729 F. 2d 541 (8th Cir. 1984). Cf. Skevofilax v. Quigley, 585 F. Supp. 582 (D.N.J. 1984) (an excellent discussion of what a trial court must do in order to implement this Court's instructions on application of the Harlow qualified immunity test).

4. CONCLUSION

What the trial court did, and what the appeals court affirmed, constitutes an application of the qualified immunity defense in civil rights actions which was abandoned by this Court in 1982. In effect, the courts below have held that there still is a subjective component of the defense. Since competent public officials are presumed to know clearly

established law and what conduct is proscribed by clearly established law, Harlow, supra, once a trial court has determined, as it must under Harlow, that the applicable law was clearly established at the relevant time, it is impermissible for that Court then to instruct the jury on the defense of qualified immunity and ask it to determine whether the officer, as the Court of Appeals below held, "should have known of that right['s existence] and ... if they knew or should have know that their conduct violated the constitutional norm." Memorandum, infra, at 3a. That is a formulation of the subjective component of the defense this Court did away with in Harlow.

It is important that this Court make perfectly clear its holding in Harlow so that its prescription will be applied with uniformity throughout the various Circuits in the federal system and within the environs of the vast Ninth Circuit.

This petition should be granted.

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Patricia Wilkins

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
February 4, 1986
CATHY A. CATTERSON
U.S. COURT OF APPEALS

PATRICIA WILKINS,	
Plaintiff-Appellant,	No. 84-6437
vs.	D.C. NO. CV 83-45683-PAR
CHRISTOPHER SAYRES, et al.,	
Defendant Appellees.	MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Hon. Pamela A. Rymer, District Judge, Presiding
Submitted November 14, 1985**

BEFORE: WALLACE, SKOPIL and FLETCHER,
Circuit Judges

Patricia Wilkins appeals from a jury verdict for defendant Anaheim police officers

* This disposition is not appropriate for publication and may not be cited to or by the Courts of this Circuit except as provided by 9th Cir. R. 21.

** The panel finds this case appropriate for submission without oral argument pursuant to Fed. R. App. P. 34(a); 9th Cir. R. 3(f).

and other individuals in her 42 U.S.C. 1983 action alleging that the defendants illegally detained her. Wilkins contends that the trial judge erred by instructing the jury on the defense of good faith immunity. She asserts that this defense was unavailable as a matter of law because the trial judge determined the law regarding the detention was settled at the time of the alleged infringement of her rights.

STANDARD OF REVIEW

This court review de novo the district court's decision to instruct the jury on the defense of good faith immunity because the court ruled as a matter of law that the instruction should be given. See United States v. McConney, 728 F. 2d 1195, 1201 (9th Cir.) (en banc), cert. denied, 105 S. Ct. 101 (1984).

ANALYSIS

The requirements for good faith immunity of public officials were explained in Procunier v. Navarette, 434 U.S. 555 (1978). The defense

is not available to public officials "[(1)] if the constitutional right alleged infringed ... was clearly established at the time of their challenged conduct, [(2)] if they knew or should have known of that right, and [(3)] if they knew or should have known that their conduct violated the constitutional norm." Id. at 562. Here, the trial court decided the first two elements of a qualified immunity defense as a matter of law, but instructed the jury on the third element.

The parties do not dispute the trial court's ruling that the law with respect to Wilkins' detention was clearly established at the time of the challenged conduct. The only question is whether this determination precluded the court from instructing the jury on the third element of a qualified immunity defense. Wilkins contends that as a matter of law the court may not instruct on the immunity defense where it determines that the law was clear.

This argument lacks merit. Wilkins misinterprets Supreme Court decisions on the immunity defense and ignores recent Ninth Circuit authority holding that the defense may present a jury question. See Harlow v. Fitzgerald, 457 U.S. 800 (1982); Bilbrey v. Brown, 738 F. 2d 1462 (9th Cir. 1984).

In Bilbrey, this court rejected the notion that the immunity defense is unavailable where the court determines that the law regarding the challenged conduct is clear. Id. at 1466-67. The court said that even "if [state officials] should have been aware of [plaintiffs' settled] Fourth Amendment rights, it is not true that the immunity defense was unavailable to them as a matter of law." Id. 1466. State officials qualify for immunity, the court said, if they "reasonably, but mistakenly, believed that they had reasonable cause or probable cause to search." Id. at 1467. Although the inquiry whether the legal right is settled is a

question for the court, "the existence of a reasonable belief that a search is lawful, viewed in light of the 'settled' nature of the law, is a question for the trier of fact." Id. The only exception is where the critical factual issues are undisputed and the court can determine as a matter of law that defendants did not act in good faith. See Fujiwara v. Clark, 703 F. 2d 357, 362 (9th Cir. 1983). Wilkins does not argue that the exception applies to this case.

Wilkins misinterprets Harlow v. Fitzgerald, 457 U.S. 800 (1982), as precluding the defense of a qualified immunity whenever the court determines that the law is not clear. Harlow holds only that a public official is not expected to know the law where it was not clearly established at the time of the challenged conduct. Id. at 818-19. It does not follow that immunity is unavailable as a matter of law where the court determines that the law

was clear. See Bilbrey, 738 F. 2d at 1466. Although, as Harlow notes, a reasonably competent public official ordinarily is expected to know the settled law, 457 U.S. at 818-19, this conclusion is distinct from the conclusion that he should have known that his conduct violated the settled law. See Bilbrey, 738 F. 2d at 1466-67.

Thus, although the district court found that the law regarding Wilkins' detention was clear at the time of the incident that precipitated this lawsuit, it properly instructed the jury to determine whether defendant police officers reasonably believed that their conduct comported with the settled law. See id.

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
February 19, 1986
CATHY A. CATTERSON
U.S. COURT OF APPEALS

PATRICIA WILKINS,	)	
	)	
Plaintiff-Appellant,	)	No. 85-5850
	)	
vs.	)	D.C. NO.
	)	CV 83-6935-PAR
FREDERICK ROUSCH, et al.,	)	
	)	
Defendant Appellees.	)	MEMORANDUM*
	)	

Appeal from the United States District Court
for the Central District of California
Hon. Pamela A. Rymer, District Judge, Presiding
Submitted February 7, 1986**

BEFORE: KENNEDY, SKOPIL, and ALARCON,
Circuit Judges

Patricia Wilkins sued Anaheim police officers and others pursuant to 42 U.S.C. 1983

* This disposition is not appropriate for publication and may not be cited to or by the Courts of this Circuit except as provided by 9th Cir. R. 21.

** The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a), 9th Cir. R. 3(f).

alleging an unlawful entry and search of her home. Wilkins contends the trial court erred in instructing the jury on the defense of good-faith immunity because the court determined that the law regarding the entry and search of her home was well-settled at the time of the alleged infringement of her rights. We affirm.

The district court's conclusion that the law with regard to an unlawful entry and search was well-established does not render the immunity defense unavailable as a matter of law. Bilbrey v. Brown, 738 F. 2d 1426, 1466-67 (9th Cir. 1984). In Bilbrey, this court held that state officials qualify for immunity if they "reasonably, but mistakenly, believe that they had reasonable cause or probable cause to search." Id. at 1467. Further, "the existence of a reasonable belief that a search is lawful, viewed in light of the 'settled' nature

of the law, is a question for the trier of fact." Id.

Despite the district court's conclusion that the law regarding the alleged unlawful entry and search of Wilkins' home was clearly established, the court properly instructed the jury to determine whether the defendant police officers reasonably believed their conduct comported with the settled law.

AFFIRMED.